Professionalism Commission Minutes, July 21, 2004

Judge Battaglia convened the meeting at 4:10 PM and asked everyone to introduce themselves. Absentees included: Michelle Barnes, Kristy Hickman, Shelly Patterson, Daryl Walters, William Hudson, Cornelius Helfrich, Judge Legg, Judge Bennett, Professor Dash, Michael O'Connor, Laurence Cumberland, Rignal Baldwin, Jr., James Otway.

The minutes from the May 12, 2004 meeting were approved. Judge Battaglia next invited reports by the various subcommittees.

Dan Saunders reported on the work of his subcommittee assigned to study professionalism guidelines and sanctions for use by judges. Mr. Saunders stated that his committee has focused on the control that Judges have over errant attorneys, with an objective of empowering judges to sanction bad conduct, and encouraging and reminding judges to exert such control. The committee has been looking into alter ego programs and noted that some lawyers are reluctant to talk to Judges about unprofessional conduct. Mr. Saunders commented that the work of his sub-committee will overlap somewhat with that of the discovery abuse issues subcommittee. Mr. Saunders is looking into the Judicial Cannons for additional input and looks forward to creating a dialogue with the appellate courts concerning the cannons and any potential issues. The third area the subcommittee is looking into is judicial education to raise judges' awareness of professionalism and its importance. Mr. Saunders believes the judiciary should take the lead through the judicial institute, judicial orientation programs, judicial conferences, bench books, etc., to teach and remind judges about implementing sanctions. Judge Battaglia then solicited comments from the rest of the meeting participants on the progress of Mr. Saunders' sub-committee.

There was a thorough discussion of alter ego programs in which a member of the bar is picked by or assigned to a judge as a contact person for those who have some issue with a judge but who are uncomfortable with a direct contact. Sometimes alter ego conversations with lawyers are anonymous, but sometimes not. This may discourage some contacts. Judge Sweeney commented that, upon hearing a comment, he would prefer to call the lawyer directly to straighten out any misunderstandings and pave the way for future contacts. Judge Sweeney opined that young lawyers, at the beginning of their careers, should make it a point to meet and visit with judges in their jurisdiction. This will allow them to understand later that any criticism of their case is not a personal criticism.

Judge Salmon asked whether judges pick their alter ego or whether that person is picked for them. This varies from jurisdiction to jurisdiction. The better practice, most commission members commented, is for the alter ego contact to be assigned to a judge. In most counties, however, the alter ego program is underutilized.

Don Braden, chair of the subcommittee on the judge's role in the bar and with the community, noted that the bar must develop criteria for determining what judges are allowed to do in the community, an area that is unclear.

Tom Lynch provided an extensive written report from the standards of professional conduct subcommittee. The subcommittee looked at codes of conduct in many other states and in various Maryland counties. Georgia appears to have one of the best and most comprehensive codes of conduct.

The subcommittee has reached a consensus on a number of points: (1) a code of conduct must be simple and accessible enough to be used regularly. It is pointless to construct a code that gets put on the shelf and forgotten. (2) Judges must be cognizant of the code and participate in its enforcement. (3) The MSBA must publish and endorse the code. (4) The code must not be a one time exercise. Attorneys must re-affirm at regular intervals. (5) Local bar associations must take an active role in raising standards of professionalism. One idea is to establish local mentoring committees that would act like AGC peer review committees. Judges could refer errant attorneys to the mentoring committee for guidance. (6) The establishment of standards of professionalism must be an effort of not only the bench and bar, but law schools as well.

Many groups and treatise writers have boiled down the elements of professionalism to 6 principles, as evidenced in the Georgia Code and the draft code attached to the subcommittee's materials. These criteria amount to a simple statement of professionalism to which lawyers could pledge themselves, sign, and post in their offices.

There was some comment that "Character Counts" is too glib a concept. A signed acquiescence to a simple code, the argument goes, may tend to homogenize the practice, discouraging would be William Kunslers and other mavericks from pushing the limits of the law for the benefit of unpopular clients or causes. Going against the grain, in the view of some, is the only way the law gets changed.

Tom Lynch, for the subcommittee, explained that the proposed professionalism code is not intended to frustrate advocacy or stifle the free speech of renegade lawyers. Others argued that good faith attempts to change the law can still be accomplished in a civil manner. The real question seems to be whether signing a professionalism code will somehow grind everyone down to the same bland level or whether effective cutting edge advocacy can be done within the bounds of accepted professionalism. This issue will receive primary attention at the next meeting.

Dana Williams, speaking for the subcommittee on discovery abuse issues, raised

the idea of "instant discovery resolution." This means a discovery judge or master who is available to rule on discovery disputes at the time they arise. Now, some judges take control of such disputes. For example, if problems arise in a deposition, the inquiry is conducted in the judge's conference room. Other judges are available by telephone to rule on disputes the same day. Many counties, however, have no established discovery resolution practice. Judge Sweeney stated that in Howard County cases are assigned, at the outset, to one judge who then can follow the case and resolve disputes. But, Judge Sweeney pointed out, micro management of such disputes is a mixed blessing. Having a judge available to resolve every discovery dispute may cause lawyers to stop trying to resolve these matters among themselves. As a result, judges spend more and more time with minor discovery and scheduling disputes -- not the most productive use of the Court's time.

One solution that has come up many times and seems to have some consensus is the appointment of special discovery masters. This idea might be to charge the offending party with the cost of such a master's work. Judge Sweeney stated that there should be a cost factor to those who "cannot play nice." Prof. Warnken asked whether the ABA has weighed in on the use of special discovery masters. Interns researching this problem reported that they have found nothing from the ABA or other states.

Judge Sweeney and others opined that family law cases are so different that discovery rules should be made different for these actions. It is unfair to apply basic civil procedure rules to family law cases.

Karen Federman-Henry represented the subcommittee for the development of a professionalism course for errant lawyers, reporting that the subcommittee will, of necessity, ride the coattails of the subcommittee on standards of professionalism in order to determine the course content. Interns have, however, supplied course material from a number of other states, which materials the subcommittee is in the process of evaluating.

Debbie Potter, Chairperson, reporting for the subcommittee on updating the professionalism course for new admittees, suggested that the course might be more valuable if it is given one year after admission, when new lawyers have had time to experience some the problems discussed in the course. In addition, the course can use additional funds in its budget.

Linda Lamone, Chairperson, and Mike Preston reported for the unauthorized practice of law subcommittee. The subcommittee raised the difficult problem of defining the unauthorized practice. The current definition is vague, but a detailed definition runs the risk of failing to specify some act that might also implicate the unauthorized practice. The Attorney General is given the authority to enforce the statute, but has ceded

enforcement to the AGC; and Bar Counsel is satisfied with the existing definition. Furthermore, the definition is contained within a statute. Asking the General Assembly to revise the definition raises as many potential problems as could be solved.

Last year, the AGC instituted 22 cases against non-lawyers. If banks and accountants are practicing law, as many lawyers complain, no one has brought a case to the AGC.

Judge Salmon, chair, reported for the subcommittee on mentoring. Judge Salmon pointed out that the MSBA has a list of lawyers willing to act as mentors posted on its web site. But this resource is underused. In general, not much is being done in Maryland. Most lawyers do not know of existing programs on the state and county levels. Many members of the Commission remarked that they have volunteered as mentors and have not received a call. Prof. Warnken and others suggested that the certain segments of the bar, (such as the criminal bar) make extensive use of ListServes. Mentoring might be done through establishment of a ListServe for this purpose, where lawyers might post questions for discussion.

Judge Battaglia adjourned the meeting.